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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO PADILLA,

Defendant and Appellant.

D073939

(Super. Ct. No. SCN370645)

APPEAL from a judgment of the Superior Court of San Diego County, K. Michael Kirkman, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

Ricardo Padilla punched his cousin, Mark, and threw him down a flight of stairs. A jury convicted him of simple assault (Pen. Code, § 240) and battery with serious bodily

injury (Pen. Code, § 243, subd. (d)). The trial court sentenced Padilla to a total prison term of six years. On appeal, Padilla contends that his conviction must be reversed because the trial court erroneously restricted his ability to impeach Mark with prior convictions. We disagree and affirm.

FACTUAL BACKGROUND

Prosecution Evidence

In March 2017 Mark was in his apartment installing shelving when Padilla visited. He had last seen Padilla a day or two earlier when Padilla had given him a ride to a home improvement store to purchase lumber. Mark let Padilla in. The men talked and drank some alcoholic beverages.¹ After Mark mentioned that Padilla, who lived with Padilla's mother, should do more to help her, "a change came over [Padilla's] face."

Padilla tried to punch Mark as Mark deflected the blows and backed out of his front door. Mark claimed that when the men were outside, Padilla grabbed Mark's shirt, spun him, and pushed him down the stairs. Mark returned to his apartment despite a fractured foot and leg. Mark saw Padilla in the apartment going through a box. After Padilla left, Mark noticed that his cellular phone and some other items were missing.

Mark's neighbor testified that she heard yelling coming from Mark's apartment. It sounded like Mark was yelling at someone. A minute or two later, she heard something being thrown down the stairs. After seeing Mark's bloody face, she called the police.

¹ In contrast, a police officer who interviewed Mark at the scene testified during cross-examination that Mark informed him that when Padilla appeared at his door, Mark told Padilla that he was not welcome and that Padilla then immediately began to hit him.

Defense Evidence

Padilla testified in his own defense. He claimed that he had taken Mark to the store earlier that morning to get lumber for Mark's shelving project. He then left and came back later in the day. He noticed that Mark had been drinking and claimed that Mark appeared upset. The men had a conversation that "upset[]" Mark and caused Mark to use foul language.

While in the restroom Padilla heard pounding, like something going down the stairs. He quickly went to the front door and saw Mark at the bottom of the stairs, trying to get up. He asked Mark what had happened, but Mark refused to answer. Padilla offered to call an ambulance, but Mark told him not to. Padilla then left.

Padilla claimed that he did not hit Mark, push him down stairs, or threaten him. Padilla denied taking anything from Mark's apartment and claimed that the phone found in his car had fallen out of Mark's pocket when they went to the store earlier that day.

DISCUSSION

I. *GENERAL LEGAL PRINCIPLES*

Ordinarily, evidence of prior criminal acts is inadmissible to show a defendant's disposition to commit such acts. (Evid. Code,² § 1101, subd. (a).) However, "[n]othing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." (§ 1101, subd. (c).) "Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used . . . for purposes of impeachment . . . in any criminal proceeding." (Cal. Const., art. I, § 28, subd. (f)(4); see

² Undesignated statutory references are to the Evidence Code.

also § 788 [evidence that a witness has been convicted of a felony may be admitted to attack his credibility].) This provision " ' "authorizes the use of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty." ' " (*People v. Edwards* (2013) 57 Cal.4th 658, 723-724.) Admission of a prior felony conviction for impeachment purposes is subject to the trial court's exercise of discretion under section 352. (*Id.* at p. 723.)

" 'The scope of inquiry when a criminal defendant is impeached with evidence of a prior felony conviction does not extend to the facts of the underlying offense.' " (*People v. Shea* (1995) 39 Cal.App.4th 1257, 1267.) Thus, "[e]vidence of prior felony convictions offered for this purpose is restricted to the name or type of crime and the date and place of conviction." (*People v. Allen* (1986) 42 Cal.3d 1222, 1270.) The trial court therefore may exercise its discretion to "sanitize" the prior convictions; i.e., allow impeachment with felonies involving moral turpitude without allowing the jury to know the specific crimes resulting in the convictions. (*People v. Sandoval* (1992) 4 Cal.4th 155, 177-178.)

Section 1103, subdivision (a) (hereafter section 1103(a)) provides an exception to the rule prohibiting character evidence in criminal cases. Section 1103(a) "allows a criminal defendant to offer evidence of the victim's character to show the victim acted in conformity with it. [Citation.] If the defendant offers evidence showing the victim has a violent character, then the prosecution may offer evidence of the defendant's violent character to show the defendant acted in conformity with it. (. . . § 1103, subd. (b), [hereafter section 1103(b), italics omitted].)" (*People v. Myers* (2007) 148 Cal.App.4th

546, 552.) The trial court retains discretion under section 352 to exclude evidence that is otherwise admissible under section 1103.³ (*People v. Fuiava* (2012) 53 Cal.4th 622, 700 (*Fuiava*).)

II. ADDITIONAL FACTUAL BACKGROUND

The People moved to exclude evidence of a 2004 incident where Mark threatened his neighbor and later pleaded guilty to making a criminal threat. The People argued that this evidence should be excluded under section 352, reasoning that evidence of Mark's prior act had little to no probative value and risked creating undue prejudice. In the event Padilla introduced Mark's prior acts, the People argued that they should be allowed to admit evidence of Padilla's character for violence under section 1103(b). The People described prior instances of domestic violence that Padilla committed against his son and ex-wife, arguing that the prosecutor should be permitted to introduce evidence of Padilla's character for violence if Padilla offered evidence of Mark's prior conduct.

At the hearing, the prosecutor noted that Mark had two prior convictions involving moral turpitude—a 2002 conviction for violating Penal Code section 273.5 (willful infliction of corporal injury) and a 2014 conviction for violating Penal Code section 422 (criminal threats). Defense counsel agreed that both convictions involved moral turpitude and should be admissible for impeachment.

³ Padilla argues that the trial court erroneously interpreted sections 788, 1101 and 1103 and that the standard of review is de novo. Padilla has not explained, with citation to authority, how the trial court misinterpreted these statutes, and we deem the argument meritless. (See *In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 1004.)

The court ruled that Mark's prior convictions "will be allowed for a limited purpose of credibility as to a [Penal Code section] 273.5 felony and as to a [Penal Code section] 422 felony." The prosecutor then requested that the court address that part of her motion to admit evidence of Padilla's character for violence if Padilla introduced evidence of Mark's prior acts at trial. The court asked defense counsel, "If you ask about the *victim's prior acts*, then any objection [if] the People put on character evidence for defendant?" (Italics added.) Defense counsel argued that Padilla's prior instances of domestic violence should be excluded because it showed Padilla's propensity for violence.

The court replied, "I understand. But the issue is at this point we don't know. If you're going to impeach the alleged victim's credibility, then the People have a right to then respond to that with your client's propensity for violence. So that's the issue. So we don't know if we're going to get there. . . . And if [the] defense does impeach the credibility of the witness, then you can respond by presenting evidence of the defendant's character for violence. Okay? But only if the defense impeaches the witness."

The parties then discussed the defense motion to exclude Padilla's prior instances of domestic violence. Defense counsel argued such evidence was inadmissible under section 1101, subdivision (a). The prosecutor noted that the court already ruled that if the victim is impeached, the People would have a right to introduce Padilla's prior instances of domestic violence under section 1103(b). The court replied that if Padilla did not impeach Mark with evidence of Mark's prior convictions, then the People should not introduce evidence of Padilla's character for violence under section 1103(b). The court

continued, stating that if the defense impeached Mark, "I already ruled on that; you can then bring evidence to show [Padilla's] character for violence, okay propensity. But not until then."

III. ANALYSIS

Padilla argues that the trial court properly concluded that Mark's prior felony convictions for domestic violence and making a criminal threat were admissible to impeach Mark's credibility under section 788. He claims that the trial court erroneously ruled that admission of this impeachment evidence would result in the admission of his prior acts of violence under section 1103(b). Based on this erroneous ruling, he claims that defense counsel decided to not impeach Mark.

The People assert that Padilla forfeited this issue by not offering any impeachment evidence, or arguing to exclude any evidence the People wanted to present under section 1103. To avoid the risk of opening the door to evidence of his prior violent conduct, the People argue that Padilla could have, but failed to, sanitize Mark's prior convictions by referring to them simply as "prior felony convictions" without discussing the nature or details of the specific crimes. Accordingly, the People claim that the trial court reasonably concluded that evidence of Mark's prior acts would be admissible not only as impeachment evidence but also character evidence under section 1103. Even assuming error, the People contend that the assumed error was harmless because the value of the proposed impeachment evidence was negligible given the extent to which defense counsel had already assailed Mark's character. We agree that Padilla forfeited his argument.

The People moved to exclude Mark's prior acts and additionally requested that, should Padilla introduce Mark's prior acts, they would be able to offer evidence of Padilla's character for violence under section 1103(b). The trial court ruled on *both* requests.

After hearing from the parties, the court overruled the People's objection to the admission of Mark's prior acts, stating that the evidence would be allowed for the limited purpose of credibility. The People then reminded the trial court of their additional argument that, should Padilla introduce Mark's prior acts, it should be allowed to introduce character evidence of Padilla under section 1103(b).

Thereafter, the trial court ruled that if the proposed impeachment evidence was introduced by the defense that it also constituted character evidence admissible under section 1103(a)(1). The court announced that the People could then respond to this evidence by presenting evidence of Padilla's character for violence under section 1103(b).

Defense counsel never objected to the court's rulings by arguing that Padilla was offering evidence of Mark's prior acts solely for impeachment and not under section 1103(a). Nor did defense counsel seek to avoid the section 1103 issue by clarifying that he sought to admit only evidence of the existence of Mark's prior felony convictions for impeachment without discussing the details of these convictions.

On appeal, Padilla is arguing for the first time that the trial court erred in ruling that evidence of Mark's prior acts was inadmissible under section 1103(a) to prove Mark's propensity for violence, claiming that the evidence was not offered for that purpose. We, however, are barred from reaching a question that has not been preserved for review by a

party "when the issue involves the admission (. . . § 353) or exclusion (. . . § 354) of evidence." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) By failing to raise the issue below, Padilla failed to preserve his right to raise the issue on appeal.

Moreover, the trial court's tentative pretrial evidentiary rulings "made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself." (*People v. Holloway* (2004) 33 Cal.4th 96, 133.) Because Padilla did not offer any impeachment evidence at trial, it is unknown what type of evidence he would have offered, or whether the trial court would have changed its tentative rulings. Thus, Padilla also forfeited his arguments by failing to obtain a final ruling.

Finally, Padilla argues that the trial court's evidentiary error violated his constitutional right to confrontation under the Sixth and Fourteenth Amendments and the right to an accurate jury determination of the facts. Padilla forfeited his constitutional arguments by failing to raise them below. (*People v. Redd* (2010) 48 Cal.4th 691, 730 [The defendant "did not raise an objection below based upon the confrontation clause, and therefore has forfeited this claim."].) Assuming his constitutional claims were preserved, they "fail on the merits because, generally, violations of state evidentiary rules do not rise to the level of federal constitutional error." (*People v. Benavides* (2005) 35 Cal.4th 69, 91.)

Even if we had the authority to consider Padilla's forfeited claim, we would conclude that the trial court did not abuse its discretion because its ruling comported with

section 1103. Padilla argues that nothing in section 1103 allows for the admission of a defendant's prior specific instances of conduct in response to the admission of impeachment evidence of an alleged victim of a crime. Padilla, however, has not cited any authority to support that proposition. To the contrary, the California Supreme Court has stated that "if . . . a defendant offers evidence to establish that the victim was a violent person, thereby inviting the jury to infer that the victim acted violently during the events in question, then the prosecution is permitted to introduce evidence demonstrating that . . . the defendant was a violent person, from which the jury might infer it was the defendant who acted violently." (*Fuiava, supra*, 53 Cal.4th at p. 696.)

Where evidence has been erroneously excluded or admitted, a judgment shall not be reversed unless the reviewing court believes the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354.) Although defense counsel chose not to impeach Mark with his prior convictions, counsel did impeach Mark's version of the incident. While cross-examining Mark, defense counsel attacked Mark's credibility from several angles, including how Mark's trial testimony differed from what he told police and how Mark could not remember many things that he had told police after the incident. During closing argument defense counsel focused almost exclusively on Mark's credibility, noting how Mark gave inconsistent stories about what transpired the day of the incident. Thus, even assuming Padilla had introduced Mark's prior convictions, we are not convinced that this impeachment evidence would have resulted in a different outcome.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.